
MEMORANDUM

TO: Senator Coleman and Representative Fox

FROM: Jonathan Anderson, Senior Title Counsel, CATIC

RE: Raised Bill No. 5430, An Act Eliminating The Requirement That There Be Witnesses To A Conveyance Of Land

DATE: March 19, 2012

CATIC opposes Raised Bill No. 5430, An Act Eliminating The Requirement That There Be Witnesses To A Conveyance Of Land, for a number of reasons. One good reason not to eliminate the witness requirement, however, is that it is a rule that has worked well for centuries. The rationale for the rule is to give solemnity to the transaction; and also preserve the evidence of the transaction by providing witnesses who can testify in court with respect to the execution of the document. Requiring a conveyance of an interest in real estate to be attested by two witnesses significantly reduces the risk that the deed or mortgage has been fraudulently executed, because those attesting to the execution must witness the signing of the document. The witness requirement in Conn. Gen. Stat. § 47-5 also provides additional protection against deeds being executed by those who are incapable, subject to undue influence, or unaware of the nature of the conveyance, because while an acknowledgment does provide that the signing of the document is the grantor's free act and deed, the acknowledging party does not, necessarily, bear witness to the circumstances surrounding the document's signing.

Connecticut has previously addressed the problem of recorded deed, mortgage or other conveyancing document but missing a witness or an acknowledgment, or containing some other defect related to the document's execution. Conn. Gen. Stat. § 47-36aa validates such a defective instrument if the document has been recorded in the Land Records—unless an action challenging the validity of the deed is commenced, and notice of lis pendens recorded, within two years after the recording of the document. The validating legislation therefore maintains the public interest in curing a defective deed while preserving the private rights of those who may need to challenge the validity of the instrument.

With recent concerns over "robo signing" of documents and allegations that some borrowers were either unaware that they were mortgaging their property, or unaware of the precise terms of the mortgage, the timing of this proposal is unfortunate. Connecticut is a state that has experienced some fallout from the collapse of the housing market, but not to the same extent as

other states. While the large number of foreclosures in some states can be tied to an overheated market that vastly inflated property values, in other states unsophisticated people appear to have been targeted by lenders and brokers who minimized or misrepresented the risks associated with excessive debt. Connecticut's attestation requirement, combined with the customary practice of having the lender and/or the borrower represented by an attorney at closing, creates an essential atmosphere of importance at the loan closing, and also provides the borrower with additional protections against misunderstanding the nature or terms of the mortgage. This is certainly the case with first mortgages. Unfortunately, most second mortgage loans and a few first mortgage transactions are the subject of closings where perhaps only one person shows up at the borrower's home to get the mortgage documents signed. This person is usually a notary public who can take the borrower's acknowledgment, and may also sign as one of the witnesses, but there may be no one present to sign as a second witness.

The State of Ohio faced a similar set of circumstances over a decade ago, where, despite the legal requirement of two witnesses when executing a deed or mortgage, many lenders utilized a single notary to administer the mortgage closing. In some cases this resulted in the recorded mortgage having only one witness. In other cases a mortgage would be signed before a lone notary, who took the borrower's acknowledgment and signed as one witness, but then somehow a second witness appeared on the mortgage at the time of the document's recording. Bankruptcy trustees then began to challenge some of these mortgages, either because they had only one witness and were therefore invalid on their face, or because there was sufficient evidence that the mortgage had in fact been attested to by only one witness at the closing, and that the second "witness" had been wrongfully inserted after the closing in an attempt to comply with the statutory requirements.

Faced with pressure from the lending industry, Ohio chose to address the improper execution of mortgages by repealing the witness requirement altogether. Was this in the best interests of the consumer? No. In fact, eliminating the attestation requirement to prevent the invalidation of improperly executed mortgages is a little like trying to address the problem of speeding by simply raising the speed limit. The actions or behaviors that created the problem remain, and now certain safeguards that existed before have been removed or diminished. Connecticut still has these safeguards in place, and should not remove the attestation requirement just to make notary closings easier, or just to follow what certain other states have done. The acquisition of real estate or the transfer of an interest in land represents one of the most important decisions a person can make. Now is not the time to make the conveyance of one's home a more casual affair. This is not the time to make it easier for elderly homeowners to encumber their home with a mortgage without really understanding the terms of that obligation. Conn. Gen. Stat. § 47-5 in its present form offers protection to property owners, while compliance with the statutory requirements is simple and straightforward. If the statute isn't broken, there is no need to fix it.

Respectfully submitted,



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CATIC